SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 485

NATHAN SILVERMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

SUPPLEMENTAL BRIEF OF NATHAN SILVERMAN, PETITIONER, IN REPLY TO OPPOSITION BRIEF OF THE UNITED STATES.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

While we believe that the arguments advanced by respondent in the brief in opposition have been fully and sufficiently covered in arguments contained in the original petition filed, we feel that there are numerous omissions and serious inaccuracies in respondent's brief, but lack of time will permit us to comment on some of those that we think should be called to this Court's attention, as follows:

Respondent's Tables v. Petitioner's Charts of Testimony

In an effort to overcome the force and effect of the "Chart of the testimony of the witnesses" (Appendix Pet.

pp. 47 and 48), respondent has created tables (Res. Br. pp. 46-48). We submit that these are misleading insofar as they are sought to be applied to this individual petitioner. While respondent has not specifically commented upon the chart contained in our petition, but endeavors to demolish it by the substitution of one that does not reflect the true state of the record, the fact remains that as shown by the chart on pp. 47 and 48 of the petition, that petitioner has been convicted in a mass trial where sixteen investor witnesses did not involve this petitioner in any manner, shape or form, and of the nine cases in which the investor witnesses did involve this petitioner, most of the transactions were individual transactions. The substitution of a chart by respondent impliedly admits the correctness of this.

Duling Transaction Shows That There Was No General Conspiracy

The respondent shows an instance on page 16, et seq., of the petition of the case of Miss Lorena Duling, which instance we contend bears out the contention that we made that this petitioner was not involved in any general scheme. The property that he sold Miss Duling was property that he personally purchased from the Plaquemines Land Company; that he was acting strictly on his own account, and any conspiracy that might be inferred from the transaction would be a conspiracy simply between him, Johnson and Diaz. An important omission that shows that Safir was no part of this transaction is the fact that Safir, who later sold this witness land, told her he had seen Diaz and Silverman talking together, which was in conflict with a statement of Diaz that he did not know Silverman—showing that he was not working with petitioner.

That petitioner purchased this land from the Plaquemines Land Co. for cash (sight draft was attached, the

deed being mailed to the bank) appears from the face of the indictment itself. (See indictment letters set forth) (R. 19, 21).

Petitioner Had No Connection With Plaquemines Land Co. Except to Purchase Land From It for Cash

On Page 7 of the petition the general statement is made that "many of the activities were carried on from the ostensible real estate office maintained under the name of Kiefer & Silverman of New Orleans in which many of the petitioners were seen and business of the company transacted" (R. 1033-42). The footnote refers to the testimony of the secretary that she came to know various defendants. The record does not show that Kiefer & Silverman were operating a real estate office; they were operating a stock and bond business and were listed with the Security & Exchange Commission. Nor does the record show that the defendants named in the footnote were connected with Silverman, e. g. (R. 36), the witness was asked where did she see Kahn, and she answered, on Union Street near the front door of the office of Kiefer & Silverman. A reading of those pages of the record will show the true situation, which, we submit, is not that which is broadly stated in the petition. The record does not show the general situation outlined at the beginning of the last paragraph of page 35 of respondent's petition, described as a concerted plotting and conniving in the sense that all of the defendants were working together. The record does not show that petitioner was a member of a general conspiracy or combination which operated in "wolf packs" against various investors at various times. As to petitioner, this broad assertion is certainly contrary to the finding of the Circuit Court. Moreover, we desire to emphasize a serious error made by the respondent in quoting on page 35 the finding

of the court that "the record leaves in no doubt that they formed one wolf pack," etc. It is significant that respondent omitted to quote the statement of the Circuit Court which just proceeded that quoted section, which read "As to *All* the Defendants *But Silverman* the Record Leaves in no Doubt they Formed one Wolf Pack." This is quite a different story, but in a mass trial such as this the identity of an individual defendant even by experienced government counsel as this omission illustrates, is likely to be lost, overlooked and his connection with the case misconstrued.

Respondent Fails to Reply to Contention That When Defendant Is Deprived of a Right Granted to Him by a Specific Command of Congress, This Is Reversible Error.

We also desire to specifically call the court's attention to the fact that respondent in opposing Point III covered in the petition, pp. 32, et seq., that respondent has been content to rest its case on the quotation from the Circuit Court's opinion wherein the court treated the refusal of the District Judge to charge the jury that the failure of the petitioner to testify should not create a presumption against him, and should not be used in the discussions or deliberations of the jury until the jury had already deliberated about six hours, as being mere technical error. Respondent has made no attempt to reply to the basic contention that when a defendant has been deprived of a right granted him by a specific command of Congress, that such error is presumed to be prejudicial and is reversible error, and this court has so held in *Bruno* v. *U. S.*, 308 U. S. 287. See also to the same effect the holding of this Court in *Koteakos* v. *U. S.*, decided June 10, 1946, Nos. 457 and 458, in which latter case this court specifically pointed out that *the error would not be treated as harmless in a case where the*

court's departure was from a constitutional norm or a specific command of Congress.

On page 19, et seq., of respondent's brief, the charge of the court containing the fundamental errors with reference to the presumption of innocence, reasonable doubt, etc., is quoted. A mere reading of that charge shows such a deprivation of fundamental rights that respondent has made no serious effort to justify the errors, but stands content to rest upon the proposition that this case is such that because of the overwhelming proof of guilt that the Circuit Court properly rejected the objection to this charge raised for the first time on appeal. We submit, that this begs the question. Respondent is confusing the proof of the degree of guilt of the defendant's misrepresentations, "rascality and scoundrelism of the meanest and lowest kind" with the question of whether or not this conviction was legally arrived at, where the indictment charged a conspiracy when, we submit, none existed, and where as to this defendant, the Circuit Court itself had doubt that this defendant was a party to the scheme, because the Circuit Court specifically found that as to all the defendants but Silverman, the record leaves in no doubt that they formed one wolf pack. That finding by the Circuit Court necessarily implies that that Court found a doubt as to Silverman, and the court, recognizing that doubt, stated that if they were mistaken as to Silverman's part in the transaction that his conviction should nevertheless be affirmed because of his close connection with the scheme. Such a finding could certainly not justify the argument presented by respondent on page 23 of its brief, "and so here, in view of the overwhelming proof of guilt, the Circuit Court of Appeals properly rejected petitioner's objection to the charge on the presumption of innocence, raised for the first time on appeal." On the contrary, we submit, that the finding of the Circuit Court does not show overwhelming proof of guilt of this defend-

ant on the essential element of this offense, i. e., whether defendant was a member of the general scheme, and as such chargeable and responsible for what others did, as shown by the chart in our original petition, pp. 47 and 48, showing sixteen irrelevant transactions improperly imputed to Silverman. We submit, that the chart in our Appendix shows the true situation, and that shown in the respondent's chart merely confuses the issue insofar as this petitioner is concerned.

Conclusion

Petitioner by his counsel respectfully prays for the relief sought in the petition filed herein.

Respectfully submitted,

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